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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

ROBERT L. VAUGHN, and G. JEANIE VAUGHN,

Plaintiffs and Appellants,

vs.

KENT A. HOGGAN and MAPLE OAKS. L.C.,

Defendants and Appellees.

MAPLE OAKS, L.C.,

Third-Party Plaintiff,

vs.

BOUNTIFUL CITY, a municipal corporation,

Third-Party Defendant

DOCKET NO. 950390-CA

ARGUMENT PRIORITY CLASSIFICATION 15

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BRIEF OF APPELLANTS

APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY, HONORABLE JON M. MEMMOTT, DISTRICT JUDGE

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COURT OF APPEALS

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STATEMENT SHOWING JURISDICTION

The Court of Appeals has jurisdiction of this appeal under Section 78-2a-3(2)(k), Utah Code Annotated (1953).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(Including standards of appellate review and supporting authority)

FIRST ISSUE: DID DEVELOPERS REJECTION OF VAUGHNS' RESCISSION EFFORT, INSISTENCE ON CONTRACT PERFORMANCE, AND VAUGHNS CONSENT THERETO, INCLUDING VAUGHNS' REQUEST FOR RETURN OF VAUGHNS' REFUND CHECK, PREVENT MUTUALLY AGREED RECISSION FROM OCCURRING OR ESTOP DEVELOPER FROM LATER PURPORTING TO ACCEPT RESCISSION?

Applicable Standards of Appellate Review:

(a) In reviewing a summary judgment, the appellate court construes all facts and reasonable inferences which may be drawn therefrom in the light most favorable to the losing party and independently reviews issues of law. Citizens Awareness Now v. Marakis, 873 P.2d 1117 (Utah 1994); Maack v. Resource Design & Const., Inc., 875 P.2d 570 (Utah App. 1994) and Baumgart v. Utah Farm Bureau Ins. Co., 851 P.2d 647 (Utah App. 1993).

(b) On appeal from a summary judgment, if it appears there is a material factual issue, the appellate court is compelled to reverse the trial courts granting of the motion. Western Farm Credit Bank v. Pratt, 860 P.2d 376 (Utah App. 1993).

(c) In reviewing a motion for summary judgment, statements and evidentiary materials of the appellant are the only credible evidence and the summary judgment is sustained only if no issue of fact which could affect the outcome can be discerned. Arrow Industries Inc. v. Zions First Nat. Bank, 767 P.2d 935 (Utah 1988).

(d) The trial courts statements or conclusions of law are accorded no deference. They are reviewed for correctness. Doelle v. Bradley, 784 P.2d 1186 (Utah 1989).

Preservation of Issue in Trial Court:

Vaughns opposed Developers' Motion for Summary Judgment (R. 132-315, 310-316) and filed two affidavits of Robert L. Vaughn with exhibits setting forth Developers rejection of Vaughns rescission effort and Vaughns consent thereto, including Vaughns request for a return of Vaughns' check. (R. 212-213, 233, 239-242, 283-286, 295)

SECOND ISSUE: DID DEVELOPER'S ACTION IN ENTERING INTO A CONTRACT UNDER WHICH DEVELOPER ACKNOWLEDGED VAUGHNS' LEGAL TITLE TO THE STAFF PORTION OF LOT 8 AND VAUGHNS ACTION IN RELIANCE THEREON ESTOP DEVELOPER FROM LATER DENYING VAUGHNS' LEGAL TITLE AS A PURPORTED BASIS FOR RESCISSION?

Applicable Standards of Appellate Review:

(a) See standards set forth under FIRST ISSUE above.

(b) The legal effect of documents and the conduct of the parties with respect to their relationship and duties is subject to review under a correctness standard. See Hermes Associates v. Park's Sportsman, 813 P.2d 1221 (Utah App. 1991) and Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239 (Utah App. 1991).

Preservation of Issue in Trial Court:

Vaughns' Motion for Partial Summary Judgment (R. 255-256) and supporting memorandum (R. 137-140) specifically presented the issue of the estoppel effect of the parties contract to the trial court.

THIRD ISSUE: DID DEVELOPER'S ACTION IN TAKING POSSESSION OF AND CUTTING A ROAD THROUGH THE STAFF PORTION OF LOT 8 CONSTITUTE OBTAINING AND KEEPING THE BENEFIT OF THE CONTRACT – ACTION PRECLUDING DEVELOPER FROM PURPORTING TO RESCIND THE CONTRACT?

Applicable Standards of Appellate Review:

See standards set forth under FIRST and SECOND ISSUES above.

Preservation of Issue in Trial Court:

Vaughns' Memorandum in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiffs' Motion for Partial Summary Judgment (R. 142-143, 311, 314,315) and Vaughns' Supporting Affidavit (R. 213) specifically presented the issue of whether Developers taking possession of and cutting a road through the staff portion of Vaughns' lot constituted taking the benefit of the contract, precluding rescission.

FOURTH ISSUE: WERE VAUGHNS ENTITLED TO A RULING ON VAUGHNS' MOTION FOR PARTIAL SUMMARY JUDGMENT PRESENTING THE ISSUE OF WHETHER DEVELOPERS WERE ESTOPPED FROM ATTACKING THE CONTRACT OR CLAIMING RESCISSION AND THE ISSUE OF VAUGHNS LEGAL TITLE TO THE STAFF PORTION OF LOT 8?

Applicable Standards of Appellate Review:

The propriety of dismissal of claims raises questions of law reviewed by the appellate court for correctness. Hunsaker v. State, 870 P.2d 893 (Utah 1993) and Brown v. Weis, 871 P.2d 552 (Utah App. 1994).

Preservation of Issue in Trial Court:

Vaughns did not withdraw Vaughns' Motion for Partial Summary Judgment (R. 255-256) nor acquiesce in the trial courts failure to make a ruling thereon.

FIFTH ISSUE: SHOULD THE SUBSEQUENTLY FILED QUIET TITLE ACTION FILED BY BOUNTIFUL CITY HAVE BEEN CONSOLIDATED WITH THIS CASE?

Applicable Standards of Appellate Review:

Was the trial courts refusal to consolidate an abuse of discretion? See Page v. Utah Home Fire Ins. Co., 391 P.2d 290 (Utah 1964).

Preservation of Issue in Trial Court:

Vaughns did not withdraw Vaughns' Motion for Order that Subsequently Filed Action be Consolidated with this Proceeding (R. 369-370) nor acquiesce in the court's denial thereof. (R. 426)

RULES OF CENTRAL IMPORTANCE TO THE APPEAL

Rule 56(c), Utah Rules of Civil Procedure:

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. [emphasis added]

Rule 42(a), Utah Rules of Civil Procedure:

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Rule 1(a), Utah Rules of Civil Procedure:

(a) **Scope of Rules.** These rules shall govern the procedure in the Supreme Court, the district courts, the circuit courts, and the justice courts of the state of Utah in all actions, suits and proceedings of a civil nature, whether cognizable at law or in equity, and in all special statutory proceedings, except as governed by other rules promulgated by this court or enacted by the Legislature and except as stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action. [emphasis added]

STATEMENT OF THE CASE

Nature of the Case

Plaintiffs/Appellants Robert L. Vaughn and G. Jeanie Vaughn, "Vaughns", appeal:

1. From a ruling and summary judgment that rescission of a March 9, 1994 contract between Vaughns and Defendants/Appellees, Kent A. Hoggan and Maple Oaks. L.C., "Developer", took place on August 16, 1994 and that the action of Developer thereafter in cutting a road up the flag portion of Vaughns' lot was based on Developer's assertion Vaughns owned no interest therein.

2. From the lower courts failure to make a ruling on Vaughns' Motion for Partial Summary Judgment.

3. From the lower courts denial of Vaughns' Motion for Consolidation of this case with the later filed quiet title proceeding filed by third-party Defendant Bountiful City.

Course of Proceedings

On September 16, 1994 Vaughns filed a Complaint in the Second Judicial District Court against Developer seeking specific performance, damages and declaratory relief regarding the status of a contract between Vaughns and Developer dated March 9, 1994, (R. 15-21) under which Developer agreed to construct a street and other improvements upon the staff portion of Vaughns' flag Lot 8 by July 1, 1994, and under which Vaughns agreed to dedicate the staff part of the lot as a public street. Vaughns' Complaint also sought a declaratory judgment concerning the question of Vaughns entitlement to contract rescission. (R. 1-6)

Upon learning Vaughns had filed a complaint, Developer wrote a letter, (R. 308-309) which purported to accept Vaughns earlier rescission of the contract (R.308-309) although Developer had theretofore strongly resisted Vaughns rescission efforts. (R. 212-213, 283-286, 293-303)

Developer disagreed with Vaughns basis for rescission (Developer's breach of contract), and asserted Vaughns had no title to the "road right-of-way" nor even a "colorable claim of title". (R. 308) Developer asserted rescission was therefore

appropriate based upon mutual mistake of fact or failure of consideration. (R. 308-309)

A few days later, on September 22, 1994, Developer cut a road up the staff portion of Vaughns' Lot 8, at the same time cashing Vaughns $5,000.00 August 16, 1994 rescission/refund check that Developer had been holding. (R. 213)

Vaughns amended Vaughns' Complaint and alleged Developers conduct in cutting a road-way through the right-of-way portion of Vaughns' Lot 8 evidenced an intent to complete the road to make it a public street and that such constituted legal affirmation of Developers' contractual responsibilities and repeated oral promises the Developer intended to perform the contract all of which estopped Developer from purporting to accept rescission and from rescinding, and that such action had made Vaughns alternative flag lot development plan impossible. (R. 10)

Vaughns' Amended Complaint further alleged the John Doe Defendants which may include agents of Bountiful City interfered with the parties contract dated March 9, 1994 by actively counseling, advising or encouraging Developers to breach or purport to cancel or rescind the same and to deny all responsibility to Vaughns thereunder and to keep the sum Developer agreed to pay as part of the consideration for Vaughns making part of their Lot 8 a publicly traveled street. (R. 12-13)

Developer answered Vaughns' original and amended complaint, (R. 29-33; 22-28) and filed a motion for summary judgment seeking judgment that the contract had been rescinded. (R. 60-62)

Vaughns filed a Motion for Partial Summary Judgment (R. 255-256) seeking a judgment that the contract had not been rescinded and could not be rescinded by Developer, but remained in effect.

Vaughns asserted that Developer was estopped from claiming Vaughns had no right in the staff portion of Lot 8 by their

conduct in entering into the contract, by Vaughns reliance on the contract, by Developer's rejection of Vaughns' rescission effort and by Developers repeated promises of contract performance. (R. 7-12, 137-140, 311-314)

Vaughns also sought summary judgment that Vaughns own fee simple title to the staff portion of Lot 8 subject only to the City's unimproved right-of-way access thereon to reach the City's uphill water tank (and to Vaughns' contractual obligations to Developer). (R. 255-256, 146-155)

Developer filed a counterclaim and third party complaint naming Bountiful City a third party defendant, alleging the right-of-way notation on the staff portion of Lot 8 constituted the same a public street accessible by the public for any purpose and that Vaughns had no right, title or interest therein whatsoever. (R. 33-38)

Bountiful City's Answer to the third party complaint admitted Developer's assertion Vaughns owned no interest in the staff portion of Lot 8. (R. 343-345)

Bountiful City then filed a separate quiet title action against Vaughns, Developer and the original subdevelopers of Indian Springs Subdivision asserting the City was the fee simple sole owner of the staff portion of Lot 8 and that no one else had any right therein. (See R. 369-375)

Vaughns moved the trial court to consolidate the later filed quiet title action with Vaughns' action pursuant to Rule 42, Utah Rules of Civil Procedure. (R. 369-370)

Disposition in Court Below

After the filing of Affidavits and Memorandums, the trial court granted Developer's motion for summary judgment without taking testimony, ruling that a valid rescission of the March 9, 1994 agreement occurred on August 16, 1994 and that Developer's

action in cutting a road up the flag portion of Lot 8 was based on Developer's belief, mistaken or otherwise, that Vaughns owned no interest in said flag portion. (R. 419-422; 346-350)

The trial court did not rule on or address Vaughns' Motion for Partial Summary Judgment.

The court denied Vaughns' motion for consolidation. (R. 425-426)

Following the trial courts granting of Developers' motion for summary judgment, Developer filed a motion for voluntary dismissal of Developer's counterclaim and third-party complaint. (R. 351-353) The trial court granted that motion. (R. 426-427)

The trial court entered an order dismissing Vaughns' amended complaint with prejudice and dismissed Plaintiffs claims against the John Doe Defendants, but stated in its ruling an order that Plaintiffs were not precluded from filing non-contract claims against Developer in a separate action. (R. 426)

STATEMENT OF FACTS

Vaughns own Lot 8, Indian Springs Estates Plat A, a subdivision of Bountiful City. (R. 207) Lot 8 is a fairly steep foot hill "flag" lot, the staff portion of which extends to and abuts Bountiful Boulevard, a city street. (R. 207) An unimproved dirt road from Bountiful Boulevard traverses the staff portion of Lot 8 and beyond to a City owned water tank higher in the foothills. (R. 208) Road usage was controlled by a gate. (R. 208)

In 1978 when the plat including Lot 8 was presented to the Bountiful Planning Commission, approval was granted, "subject to Lot 8 being a flag lot, in order to maintain a future unimproved access or right-of-way into the mountain area." (R. 159-164) The Indian Springs Estates Plat A subdivision plat bears the

notation "54' road right-of-way" on the staff portion of Lot 8. (R. 72)

Vaughns were advised by Bountiful City's Engineering Department that Lot 8 was a fully improved buildable flag lot with utilities having been stubbed into the lower staff portion thereof abutting Bountiful Boulevard and that to build on the flag lot Vaughns would be required to install a driveway up the right-of-way, that the City would not install any improvements for Vaughns and that Vaughns could lock the gate across the right-of-way, giving the Water Department of Bountiful City a key for access to the City owned uphill water tank. (R. 208)

In the fall of 1993 Vaughns had house plans prepared and obtained a long term financing commitment for constructing a residence on Lot 8. (R. 208) In the course of discussions with Bountiful City's Engineering Department, the Department advised Vaughns a developer, Defendants and Appellees, Kent A. Hoggan and Maple Oaks, L.C., "Developer", was planning to develop property East of Lot 8 into a residential subdivision and in connection therewith would want to make the staff portion of Vaughns' Lot 8 a street to the Developers subdivision. (R. 209-210)

Developer determined that rather than litigate the legal status of the staff portion of Lot 8, if Vaughns would dedicate that portion of Lot 8 as a street for public use by signing Developer's plat Developer would install street and other off-site improvements including utility stubs and slope retention devices specifically benefiting and making the balance of Lot 8 a usable building lot conforming to City requirements for steep lots, with driveway access into the intended street. (R. 210-211)

Developer promised to install the street and other improvements by July 1, 1994. (R. 211, 282)

An agreement so providing was signed by Vaughns and Developer on March 9, 1994. (R. 225-231)

Vaughns altered their lot plan to depict a driveway from the residence they intended to construct on Lot 8 to access the improved street Developer agreed to build and complete through the staff portion of Lot 8. (R. 211)

Vaughns requested a building permit from Bountiful City. (R. 208, 216-218, 220) The City refused to issue Vaughns a building permit until an off-site improvement completion bond should be posted by the Developer guaranteeing completion of the off-site improvements including roads, streets, curb and gutter the Developer intended to install to benefit Developer's intended subdivision. (R. 211-212, 282)

The Developer did not post an off-site improvement bond, nor commence installing improvements as required by the parties March 9, 1994 agreement. (R. 212, 282)

Vaughns continued to seek a building permit from the City without success. (R. 212, 282)

On July 26, 1994, Vaughns received a letter from Bountiful City stating a building permit could be issued to Vaughns either on a basis consistent with a new street being installed on the staff portion of Lot 8 or on the basis of Lot 8's flag lot frontage on Bountiful Boulevard, the latter option being contingent upon Vaughns submitting a statement to the City Vaughns were no longer cooperating with the Developer and would not dedicate any portion of Vaughns' Lot 8 under the Developers' subdivision. (R. 282, 223-224)

Developer advised Vaughns that Developer's off-site improvement bond would be posted by August 15, 1994, but failed to do so. (R. 283)

On August 16, 1994 Vaughns sent a letter to Developer returning the sum of $5,000.00 which had been paid by Developer to Vaughns pursuant to the March 9, 1994 agreement, and stated the agreement was rescinded for breach on the Developers part and

advised Developer Vaughns would proceed with flag lot development. (R. 83-84, 283)

Developer responded by asserting the contract could not be rescinded, that the Developer would be damaged in the neighborhood of $500,000.00 if Vaughns did not honor their side of the agreement and Defendants again promised an off-site bond would be posted by August 31, 1994 so that Vaughns could obtain a residential construction permit. (R. 284, 297-300)

Vaughns agreed the contract should go forward and the parties met in August and September endeavoring to work out matters pertaining to Developer's delayed performance. (R. 284, 293-296, 301-303)

By letter dated August 22, 1994, Vaughns' counsel requested a return of Vaughns refund check which had been sent to Defendants on August 16, 1994 which Developers had kept but had not cashed. (R. 284, 295) Developer did not return the check, but did not cash it. (R. 239, 285)

On the assumption the contract would be performed by Developer, as promised, Vaughns expended time and legal expense in endeavoring to negotiate matters of Developer's performance of the agreement to a conclusion, and did not alter their building plans nor make application for a flag lot building permit. (R. 286)

Vaughns did not agree that Developer could commence cutting a road or otherwise using or occupying the flag portion of Lot 8 without posting an off-site improvement bond with the City so the City would issue Vaughns a building permit. (R. 286)

By mid-September 1994 it was too late for Vaughns to apply for a flag lot development permit and proceed with construction in 1994. (R. 286)

In early September, Developer, who still had not posted an off-site improvement bond, refused to engage in any further

discussion with Vaughns, (R. 286) but had not cashed Vaughns' $5,000.00 check and had not proceeded to cut a road or install other improvements in the staff portion of Vaughns' Lot 8. (R. 213)

Developer maintained Vaughns had no grounds for rescission, had breached the contract and could not rescind the contract (R. 284, 297-300) until September 16, 1994, the day Vaughns filed Vaughns' initial complaint in this matter.

On September 16, 1994, Developers took the position Vaughns had no title to the staff portion of Vaughns' Lot 8 so that contract rescission was appropriate on that basis. (R. 308-309)

On September 22, 1994 Developer cashed Vaughns' $5,000.00 check and cut a road up the flag portion of Lot 8, precluding Vaughns from flag lot development and possibly precluding all development of the balance of Lot 8. (R. 95-96, 213)

On the assumption Developer would be posting an off-site improvement bond so Vaughns could get a building permit, by letter dated September 30, 1994, Vaughns tendered a deed to the staff portion of Lot 8 directly to Bountiful City, with notice to Developer, so it would be available for recording and advised the City, and Developer, Vaughns wished to do everything possible to expedite Developer's performance of the contract. (R. 247-250, 286)

SUMMARY OF ARGUMENTS

1. Developers rejection of Vaughns' rescission effort, insistence on contract performance, and Vaughns consent thereto, including Vaughns' request for return of Vaughns' refund check, prevented mutually agreed recission from occurring and estopped Developer from later purporting to accept rescission.

Vaughns trial court opposition to Developer's Motion for Summary Judgment and Vaughns' Motion for Partial Summary Judgment

and supporting affidavits and the documents submitted therewith presented to the trial court underlying facts showing no mutually agreed rescission occurred, rather the contrary. Developer insisted on proceeding, elected to proceed, and Vaughns relied on Developer's promises of contract performance and bypassed all opportunity to develop Lot 8 as a flag lot with a private drive.

The legal principles of estoppel and waiver should have been applied by the trial court.

Vaughns pleadings clearly presented the issue of the legal effect of Developer's rejection of Vaughns' rescission effort, Developer's insistence on contract performance and Vaughns' consent thereto. The facts were undisputed, and presented not just genuine issues of material fact but facts upon which the trial court should have ruled and upon which this court should rule no mutually agreed rescission occurred as a matter of law.

2. Developer's action including entering into a contract under which Developer acknowledged Vaughns' legal title to the staff portion of Lot 8 and Vaughns action in reliance thereon estopped Developer from later denying Vaughns' legal title as a purported basis for rescission.

Vaughns presented undisputed facts as to the conduct of Developer before the Bountiful City Council and in entering into the contract with Vaughns, Vaughns reliance thereon and injury arising from Developers repudiation of Developers contract.

Vaughns are entitled to a ruling of this court that Developers were thereby estopped from denying Vaughns' legal title and waived Developer's right to deny Vaughns legal title as a claimed basis for rescission as a matter of law.

3. It was not disputed that Developer took possession and cut a road through the staff right-of-way portion of Vaughns' lot on September 22, 1994.

Such constituted the taking of the very benefit Developer was to receive under the contract, to wit: the right to make the staff right-of-way portion of Vaughns' lot a dedicated publicly traveled road.

Developer's action in taking possession of and cutting a road through the staff portion of Lot 8, after months of promising performance constituted obtaining the benefit of the contract and precluded Developer from rescinding the contract since contract rescission requires both prompt action and restoration of contract benefits received by the rescinding party.

Developer was as aware as Vaughns of the basic facts and legal issues before contracting and there was no mutual mistake of fact at all upon which rescission could be legally justified. Vaughns are therefore entitled to a judgment of this court that contract rescission is not a remedy available to Developer.

4. Vaughns were entitled to a ruling on Vaughns' motion for partial summary judgment presenting the issue of whether Developers were estopped from claiming rescission and the issue of Vaughns legal title to the staff portion of Lot 8.

Rules 54 and 56, Utah Rules of Civil Procedure, plainly entitle litigants to rulings or a trial on all claims made and the trial court should not have dismissed the case without ruling on the claims made by Vaughns amended complaint and those presented by Vaughns' Motion for Partial Summary Judgment. The trial courts dismissal of the action without ruling on such claims was inappropriate, notwithstanding the court purported to allow Vaughns to later assert such claims in another action. There is no basis in the Rules of Civil Procedure for dismissing or refusing to consider filed, presented claims by stating they can be asserted in some other proceeding at some other time. The court should have considered all the claims made as to the

contract rescission issues together and in logical order rather than making a ruling likely to be affected by other later rulings.

5. Bountiful City's subsequently filed quiet title action should have been consolidated with this case.

The later filed quiet title action involved the same parties and the same issue as this case —legal interests in the staff right-of-way portion of Lot 8. That later filed case should therefore have been consolidated with this case under a proper application of Rule 42, Utah Rules of Civil Procedure to save unnecessary litigation costs and delay. The trial court could have ordered a separate later trial on the legal title issues if any issues remained after ruling on all contract issues. It was therefore an abuse of discretion for the trial court to deny Vaughns' Motion for an Order of Consolidation.

ARGUMENT

POINT I

DEVELOPERS REJECTION OF VAUGHNS' RECISSION EFFORT, INSISTENCE ON VAUGHNS' CONTRACT PERFORMANCE AND VAUGHNS' CONSENT THERETO, INCLUDING VAUGHNS REQUEST FOR RETURN OF VAUGHNS' REFUND CHECK PREVENTED MUTUALLY AGREED RESCISSION FROM OCCURRING AND ESTOPPED DEVELOPER FROM LATER PURPORTING TO ACCEPT RESCISSION.

Rule 56(c), U.R.C.P., provides that summary judgment can be rendered only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits if any, show there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

The party against whom a summary judgment is sought is entitled to have all the facts presented and all the inferences fairly arising therefrom considered in a light most favorable to him. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

It is not necessary for the party opposing summary judgment to prove its legal theory. It is only necessary to show a genuine issue of fact exists for trial. Salt Lake City Corp v. James Constructors, Inc., 761 P.2d 42 (Utah Ct. App. 1988).

If there is any genuine issue as to any material fact the motion should be denied. Ehlers & Ehlers Architects v. Carbon Co., 805 P.2d 789 (Utah Ct. App. 1991).

The parties dealings after August 16, 1994 as shown by Affidavits of Robert L. Vaughn and correspondence clearly show Developer rejected Vaughns rescission effort and conduct by Developer estopping Developer from belatedly purporting to accept rescission and that Developer waived the right to accept Vaughns' rescission, elected to proceed with contract performance and that the Vaughns relied on Developer's promises of performance, consenting thereto.

In any event, the Vaughn Affidavits and correspondence certainly raised genuine issues of material fact respecting such issues precluding the granting of summary judgment to Developers.

The following facts as to the dealings of the parties before and after Vaughns August 16, 1994 rescission letter were not disputed by Developer:

Under Developer's March 9, 1994 contract with Vaughns, Developers agreed to install "off-site" improvements upon the staff portion of Vaughns' Lot 8 by July 1, 1994, and to exercise reasonable good faith efforts to encourage Bountiful City to issue Vaughns a building permit. (R. 227)

Developer did not post an off-site improvement bond with Bountiful City with the result the City would not issue Vaughns a building permit. (R. 282)

On July 26, 1994, Robert Vaughn and his attorney met with the Bountiful City Attorney concerning obtaining a building permit and Bountiful City gave Vaughns a letter stating the

City's position that a building permit could be issued Vaughns on a basis consistent with a new street being constructed or on the basis of flag lot frontage on Bountiful Boulevard, the later option being contingent on Vaughns submitting a statement to the City Vaughns are no longer cooperating with Developer and would not dedicate any portion of Vaughns' lot under Developer's subdivision (R. 283, 223-224)

Based on that advice, at Vaughns' request, Vaughns' attorney wrote letters to Defendants on July 28, 1994 and August 10, 1994 advising Defendants Vaughns were incurring damages by reason of the delay and demanding performance, else Vaughns would rescind the contract and proceed to develop Lot 8 as a flag lot. (R. 283, 288-290, 291-292)

Developer thereupon promised Vaughns Developer would post the bond by August 15, 1994. (R. 283)

The July 28, 1994 letter included the following advice to Developer:

> Since it is unclear at this point whether you will be able to perform as required above by August 15, 1994, and Vaughns use of their lot as a flag lot with access to Bountiful Blvd. may require a differing scheme of access from that contemplated if a street is provided by you, do not run expenses or commence construction on Vaughns' lot until after the conditions of this letter are met. [emphasis added] (R. 290)

The July 28, 1994 letter further advised Developer that if Developer was unable to perform by August 15, 1994 Vaughns would rescind the March 9, 1994 contract, so advise the City and ask Associated Title to return a deposited deed to the right-of-way portion of Plaintiffs lot. (R. 290)

Developers did not post a bond by August 15, 1994, as promised. (R. 283)

Vaughns then requested their attorney to send a letter to Defendants dated August 16, 1994 which advised Developer the

contract was rescinded for Developer's nonperformance, returned the $5,000.00 paid by Developer under the contract and advised Developer that Vaughns would proceed with flag-lot development and by copy of said letter Associated Title Company was requested to return the deed to the staff portion of Vaughns' Lot 8. (R. 83-84, 283)

On August 21, 1994, Vaughns placed a "No Trespassing" sign on the staff portion of Lot 8 and that evening John Clark, representing Developer, came to Vaughns' residence, stated the contract could not be rescinded and that his lawyer had said so and threatened to file legal action and, after considerable discussion, advised Affiant that Defendants would get all things completed in 10 days – by August 31, 1994. (R. 283-284) That statement led Vaughns to believe and they did believe Developer would file an off-site improvement bond by then so Vaughns could obtain a residential construction permit. (R. 284)

Vaughns then requested their attorney to write a further letter to Developer on August 22, 1994, which extended the time for Developer to perform the Agreement (by posting a bond) to August 31, 1994, so Vaughns could get a building permit. That letter stated the issue of damages would be reserved for determination by an independent mediator, if Developer would so agree, and requested a return of Vaughns' check in the sum of $5,000.00 sent to Developer on August 16, 1994. (R. 284, 293-295) By copy of said letter Associated Title was requested to continue to assist Developer to conclude the mechanics of document assembly and signing for the purpose of getting a bond to the City and a building permit for Vaughns. (R. 295)

On August 26, 1994, Vaughns' attorney received a letter from Developer's attorney which asserted Developer would be damaged "in the neighborhood of $500,000.00" if "Vaughns do not honor their side of the Agreement" and which asserted Vaughns had

failed to convey the property required to be dedicated for the street and which promised performance by Developer "within a few days". (R. 284, 297-298)

Thereafter on or about August 29, 1994, Vaughns were orally advised by John Clark, representing Developer, that Developer was ready to proceed and go forward with their development and the posting of a bond and the same day Vaughns' attorney received a second letter from Developer's Attorney promising Developer would post a bond by Wednesday, August 31, 1994 as promised by John Clark on August 21, 1994. (R. 284, 299-300)

Vaughns' attorney responded to Developer's August 29, 1994 letter by letter dated August 30, 1994, advising Developer of the City's position which continued to be that all that was necessary for Vaughns to get a building permit was for Developer to post an off-site improvement bond (to guarantee completion of the off-site improvements in Developer's subdivision and on the staff portion of Vaughns' Lot 8.) By copy of that letter Vaughns urged Associated Title Company to conclude the mechanics of document assembly and signing for the purpose of satisfying City requirements and getting the City to issue Vaughns a building permit. (R. 284, 302-303)

No bond was posted by August 31, 1994 and on that day Robert Vaughn, his attorney, Developer Kent Hoggan, John Clark (representing Developer) and Developer's attorney met to work matters out. (R. 284-285) Vaughns' attorney prepared a written settlement draft and furnished it to Developer's attorney. (R. 285)

On September 2, 1994, Developer's attorney wrote two additional letters to Vaughns' attorney about resolving the matter, reaffirming Developer's preparedness to proceed with performance, asserting Vaughns were in breach of the Agreement,

stating Vaughns claims were unjustified and enclosing a written contract settlement proposal. (R. 285, 304-306)

On September 7, 1994, Developer's attorney sent another letter to Vaughns' attorney rejecting Vaughns' suggested changes in Developer's settlement proposal draft and stating: "We have suggested the alternative of the parties proceeding with performance, with the alleged defaults and damages of the parties (both sides) being mediated (see my letter of September 2, 1994)". (R. 285, 307)

Vaughns' attorney respond to said letter on behalf of Vaughns , by letter dated September 8, 1994, outlining the history of the parties dealings in a further effort to work matters out. (R. 285, 233-246)

That letter included the following:

> The unexplained delay at that point suggested your client could well fail to post the bond by August 15, so it appeared Vaughns building alternative would to be to rescind the Agreement for non-performance on your clients part and to proceed with "flag lot" development. (emphasis added) (R. 238)
>
> Therefore your client was told not to incur expenses as to Vaughns' lot until after Vaughns received the assurances as to performances and liquidated damage sum stated in the letter. (R. 238)
>
> On August 16, 1994 at the request of Robert Vaughn I wrote a letter to Bountiful City and another letter to your clients advising that because of lack of promised performance on the part of your clients by the close of business August 15, the March 9 Agreement was rescinded by the Vaughns and I returned your clients money paid the Vaughns pursuant to that Agreement. That letter further advised your clients the Vaughns would proceed with flag lot development. (emphasis added) (R. 239)
>
> Your clients have kept the check sent back with my letter. I understand they have not cashed it. (R. 239)

Upon Developer's oral and written rejection of Vaughns' August 16, 1994 rescission letter and Developers repeated

assurances they intended to perform, communicated to Vaughns orally and in writing Vaughns relied thereon in expending substantial personal time and incurring legal expense in endeavoring to negotiate matters of performance of the Agreement to a conclusion, and on the assumption the contract would be performed Vaughns did not alter their building plans or make application for a flag lot building permit. (R. 286)

At no time did Vaughns agree or consent that if the contract was rescinded Developer could nonetheless cut a road through the staff portion of Vaughns' Lot 8. (R. 286)

At no time during the course of the discussions Vaughns had with Developer after August 16, 1994 did Developer, or any person acting on behalf of Developer, ask for nor did Vaughns offer any change in the terms of rescission, which Developer had not accepted in any event, but had expressly rejected as set forth above. (R. 286)

Vaughns' rescission terms included return of the parties to their pre-contract position so Vaughns could proceed, and Vaughns intended to proceed, with development of their Lot 8 as a flag lot with no public street, only a private driveway access to Bountiful Boulevard. (R. 286, 83-84)

By mid-September, 1994 it was too late in the season for Vaughns to apply for a flag lot development permit and proceed with construction in 1994. (R. 286)

After sending their September 7, 1994 letter, Developer refused to engage in further contract settlement discussions so Vaughns requested their attorney to file a complaint seeking a judicial resolution of the matter. (R. 286) Vaughns' Complaint was filed on September 16, 1994. (R. 1)

The same day, upon learning of the suit, Developer's attorney sent a letter to Vaughns' attorney stating Developers accepted rescission but disagreeing with the basis for rescission

set forth in Vaughns' August 16, 1994 letter. Developers letter asserted that Developers believed Developer had not breached the contract and stated Vaughns had not title to the road right-of-way nor even a colorable claim of title so that rescission was appropriate "based on a mutual mistake of fact and/or failure of consideration." (R. 286, 308-309)

A. There was no mutually agreed rescission.

For mutual rescission to occur, both contracting parties must consent to the terms of the rescission. There must be an offer and an acceptance of the offer, e.g., a mutual meeting of minds. Spor v. Crested Butte Silver Min., Inc., 740 P.2d 1304 (Utah 1987) and Bazurto v. Burgess, 666 P.2d 497 (Az. App. 1983).

As set forth above, Developer rejected Vaughns rescission on the terms offered – that the parties would be returned to their pre-contract position with Vaughns proceeding with flag lot building plans in 1994 for a private secluded residence not on a street. Developer vigorously resisted rescission, asserted Vaughns had no basis for rescission and could not rescind and promised performance.

Vaughns relied on that promise in the expectation performance as promised would occur and took no steps to proceed with flag lot development.

Clearly there was no factual basis for finding mutually agreed rescission on Developer's Motion for Summary Judgment – only a factual basis for finding there as no mutually agreed rescission, or, at the very least, a question of fact was preserved for trial.

B. Developer was equitably estopped by Developer's conduct after August 16, 1994 from purporting to accept rescission or rescinding the contract.

Equitable estoppel is conduct by one party which leads another party in reliance thereon to adopt a course of action

resulting in detriment or damage if the first party is permitted to repudiate that parties conduct. Perkins v. Great-West Life Assur. Co., 814 P.2d 1125 (Utah App. 1991).

As set forth above, immediately upon receipt of Vaughns letter dated August 16, 1994, Developer, acting through by John Clark, asserted Vaughns had no right to rescind, and could not rescind, asserted that Developer would be damaged if Vaughns did not perform the Agreement and promised to post a bond and otherwise perform so that Vaughns could proceed with getting a building permit on the basis of constructing a house fronting on the street Developer proposed to build.

Vaughns thereupon relied on Developers promises of performance, extended the time for performance, refrained from seeking a building permit on a flag lot development basis and expended substantial personal time and incurred legal expense in endeavoring to work matters out after Developer failed to post a bond by the times promised.

Vaughns bypassed all opportunity to commence flag lot development late in the summer of 1994 in reliance on Developers' promises. Vaughns gave up substantial legal rights and incurred substantial legal expense by reason of Developers' conduct in promising contract performance inducing Vaughns to go along with further delay in bond posting.

Developer thereby became equitably estopped from changing Developers' position and belatedly purporting to accept rescission in mid-September 1994 by Developers' months conduct asserting Vaughns could not rescind and agreeing to perform by which Developer obtained Vaughns consent to contract performance. See Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977) and Perkins, supra.

C. Developer waived Developer's right to accept contract rescission.

Waiver is the voluntary and intentional relinquishment of a known right made knowingly, intelligently and voluntarily. Beckstead v. Deseret Roofing Co., Inc., 831 P.2d 130 (Utah App. 1992) and State v. Brooks, 833 P.2d 362 (Utah App. 1992).

Developer had the right to accept Vaughns rescission after August 16, 1994, on the stated terms thereof and had Developer promptly done so, Vaughns would have proceeded to amend their lot development plan to apply for a flag lot building permit and commenced building in late summer 1994.

As set forth above, Developer did not exercise Developer's right to accept rescission, but on the contrary, on August 21, 1994, Developer threatened Vaughns with legal action if Vaughns proceeded with rescission, and promised that Developer would get all things completed in 10 days. Vaughns accepted that promise by letter dated August 22, 1994.

Further, Developer wrote letters dated August 26, 1994, August 29, 1994 and September 2, 1994, denying Vaughns had any legal rescission right, threatening litigation if Vaughns proceeded with rescission and making continued promises Developer would perform the contract, which promises Vaughns accepted and relied on and pursuant to which Vaughns refrained from seeking a building permit on the basis of flag lot development and spent considerable personal effort and incurred legal expense towards contract performance based on Developer's promises.

Developer's conduct amounted to a waiver of a known right as a matter of law, especially when the waiver of the right to accept rescission and election, indeed demand, of going forward was made with the advice and assistance of Developer's legal counsel.

D. Developer elected to go forward with performance of the contract.

It is elementary contract law that a party does not have the right to proceed both with contract rejection and contract acceptance at the same time.

By electing and demanding to proceed with performance, with which election Vaughns agreed, Developer made a binding election which Developer had no legal right to abandon to the detriment of Vaughns.

Developer conduct in electing to proceed with the contract and in fact threatening Vaughns with a lawsuit for substantial damages if Vaughns would not go forward constituted the clearest kind of an election to affirm and go forward with the contract.

E. Plaintiffs relied upon Developer election to go forward with the contract.

As set forth above, Vaughns reasonably relied on Developer's promises to go forward with the contract by not demanding a building permit be issued for flag lot development by putting in time and incurring legal expense in endeavoring to negotiate matters of contract performance to a final conclusion and in said process lost the 1994 construction season.

Said reliance was very reasonable under the circumstances and precluded Developer from belatedly taking a contrary position purporting to accept rescission to the detriment of Vaughns.

Mutually agreed rescission did not occur. Developers rejection of Vaughns' rescission letter and insistence on contract performance and Vaughns agreement thereto and foreseeable conduct in reliance thereon estopped Developer from belatedly changing positions as a matter of law. Developer waived Developer's right to accept contract rescission, elected to perform the contract, and Vaughns relied upon that election.

The legal effect of documents and the conduct of the parties with respect to their duties under those documents is subject to appellate review in any event under a correctness standard. See

Hermes Associates v. Parks Sportsman, 813 P.2d 1221 (Utah App. 1991) and Progressive Acquisition Inc. v. Lytle, 806 P.2d 239 (Utah App. 1991).

Therefore, to avoid a second appeal, Vaughns request this court to set forth the rescission rejection/estoppel/waiver and election legal effect of the conduct of Developer referred to in the documents in the record and above.

POINT II

DEVELOPER'S ACTIONS INCLUDING ENTERING INTO THE CONTRACT UNDER WHICH DEVELOPER SPECIFICALLY ACKNOWLEDGED VAUGHNS' LEGAL TITLE TO THE STAFF PORTION OF LOT 8 AND VAUGHNS' ACTION IN RELIANCE THEREON ESTOPPED DEVELOPER FROM LATER DENYING VAUGHNS' LEGAL TITLE AS A PURPORTED BASIS FOR CONTRACT RESCISSION.

A. Developer's actions estopped Developer from denying Vaughns legal title.

All of the elements of estoppel are present in the instant case vis: (a) admissions, statements and acts of Developer inconsistent with Developers later claim Vaughns have no rights to the staff portion of Lot 8; (b) action by Vaughns on the faith of such admissions, statements and acts; (c) injury to Vaughns resulting from allowing Developer to contradict and repudiate Developer's admissions, statements and acts. These estoppel elements are summarized in van der Heyde v. First Colony Life Ins. Co., 845 P.2d 275 (Utah App. 1993); Mendez v. State Department of Social Services, 813 P.2d 1234 (Utah App. 1991); and Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990). See also Perkins v. Great-West Life Assur. Co., 814 P.2d 1125 (Utah App. 1991).

Developer had apparently been working on Developer's Viewpoint/Highland Oaks Subdivision for several months and possibly for over two years before the March 9, 1994 contract was signed. See January 4, 1994 Bountiful Planning Commission Minutes made Exhibit "C" to the Arden F. Jenson Affidavit of

Certification. (R. 166) These minutes note both Kent Hoggan and John Clark were present and that their property had been granted preliminary subdivision approval by the City Council over two years before – on December 23, 1992. These minutes include an access road condition or comment (number 7 on page 2) that: "This development has two access points: from Bountiful Blvd. at approximately 3750 So., between lots 7 and 9 of Indian Springs Estates Plat A on the right-of-way dedicated as part of lot 8...." (R. 166)

Developer was obviously well aware of the "Road Right-Of-Way" and "0.43 Ac" notations on the staff portion of Lot 8 prior to contracting.

In the March 1, 1994 Bountiful Planning Commission Minutes the attendance of Kent Hoggan and John Clark was noted. See March 1, 1994 Bountiful Planning Commission Minutes made Exhibit "D" to the Arden F. Jenson Affidavit of Certification. (R. 169) A condition of approval of Developer' subdivision was: "7. Completion of all site improvements to Bountiful Boulevard and dedication of the right-of-way as required;". [emphasis added]

On the top of the second page of said minutes (R. 170) the following appears:

> Regarding #7, adjacent property owner Robert Vaughn said according to the minutes of January 19, 1994, the right-of-way has already been dedicated. Mr. Balling replied that legally it may not be classified as dedicated, but it is recorded as a road right-of-way. Mr. Hoggan said their position has been that whether it is dedicated or not, they would like to work with Mr. Vaughn because he plans to do something on lot 8 of Indian Springs. They will put the improvements in and make sure the road is dedicated the way it should be whether for Mr. Vaughns' lot or the development. They understand that the title report will have to include that section, and it cannot be recorded until this is done. (R. 170)

An admission and statement more inconsistent with Developer's later assertion that Vaughns had nothing to sell could hardly be expressed. Developers were fully aware of the notations on the plat on the staff of Lot 8 and chose to work with Vaughns rather than asserting the right-of-way area was already a dedicated public street in which Vaughns had no rights.

Developer signed a contract with Vaughns on March 9, 1994. (R. 211, 225-231) The signed contract specifically recites on pages 1 and 2 as follows:

• • •

> WHEREAS, Vaughns own Lot 8, Indian Spring Estates Plat "A" Bountiful, Davis County, Utah which is a flag lot abutting Bountiful Boulevard, and
>
> WHEREAS, Hoggan intends to develop a subdivision known as HIGHLAND ESTATES in the foothill area of Bountiful near said flag Lot, and
>
> WHEREAS, Hoggan desires that the "flag" portion of Vaughns said Lot 8, consisting of a strip 54 feet more or less in width shown on the Plat of Indian Springs Estate Plat "A" as a right-of-way, become an improved dedicated street meeting the requirements of Bountiful City as a means of access to Hoggan's proposed Highland Estates subdivision, and
>
> WHEREAS, Vaughns have submitted an application to the City of Bountiful for a building permit for the construction by Vaughns of a residence and related improvements on said Lot 8, which building permit has not yet been issued, and
>
> WHEREAS, the elevation of Vaughns prospective house on said Lot 8 and the elevation and contour of the proposed driveway which will access the same has been depicted on certain survey plats prepared by surveyor James G. West and Vaughns require the elevation of the proposed public street over and across the flag portion of said Lot 8 to be such as will accommodate the proposed driveway within Bountiful City maximum slope requirements, and
>
> WHEREAS, the parties have agreed that Vaughns will sign Hoggan's Highland Estates Subdivision Plat which is

> proposed to be recorded so that the flag portion of Lot 8 will become a dedicated street providing Hoggan provides the consideration hereinbelow set forth to Vaughns, and the parties desire to set forth their Agreement concerning the conditions upon which the Vaughns will sign said Plat, [emphasis added] (The "flag" reference should read "staff".) (R. 225-226)

. . .

The signed contract with its express recital that Vaughns' own the portion of Lot 8 shown as a road right-of-way constitutes the clearest and most unequivocal kind of an act satisfying the first element of estoppel.

The second element, action by Vaughns on the faith of Developer's admissions, statements and acts, is clearly satisfied. Under the contract Vaughns gave up their option of developing their lot as a secluded flag lot with private access to Bountiful Boulevard. Vaughns altered their site plan to show access to the intended road. (R. 211) Vaughns obtained a construction loan incurring substantial cost in connection therewith. (R. 208) Vaughns expended substantial time and incurred legal expense in endeavoring to get Developer to post a bond and to perform per the contract so the City would issue Vaughns a building permit. (R. 211-213)

The third element of estoppel is clearly satisfied. Allowing Developer to contradict and repudiate Developer's admissions, statements and contract act will not only take from Vaughns the option of secluded flag lot development but also deprive Vaughns of the benefit of the contract (proper street elevation, utility stubs and slope retaining wall) and possibly destroy all value of the remainder of Lot 8 as a building lot, or at the very least, make it very expensive to utilize the same. (R. 213)

In Carnesecca v. Carnesecca, 572 P.2d 708 (Utah 1977) documents for the sale of real property reflected one-third ownership each in certain related selling family members. The documents were signed, the sellers thereby binding themselves to sell and giving up legal rights to make claims as to different ownership shares contrary to the sales documents. Three weeks later one of the sellers opposed the one-third each contract division of sale proceeds and asserted a claim to half. The court held such person was equitably estopped to make such claim, having contractually agreed to the division of sales proceeds in thirds, other parties having relied thereon to their detriment if the objecting party was permitted to repudiate her conduct.

To the same effect is Kephart v. Portmann, 855 P.2d 120 (Mont. 1993) in which an irrigation ditch agreement had been signed in which Kephart acknowledged and recognized the existence of Portmann's ditch right to conduct water to Portmann's property. Portmann had used and improved the ditch. Kephart later sued, contending Portmann really had no ditch rights and sought to enjoin Portmann from interfering with the ditch and its diversion structures. The court held that Kephart's acknowledgment in the irrigation ditch agreement of the Portmann's ditch right, estopped Kephart from later challenging the existence of the Portmann's ditch right. Having concluded Kephart was estopped from denying Portmann's ditch right, the court held it did not need to otherwise determine the right.

As a matter of law, under the undisputed evidence, mostly in documents, Developer is estopped from repudiating Developer's admissions, statements and written contract, all of which specifically recognize Vaughns' property rights.

B. Developer waived any claim Vaughns lacked title to the staff part of Lot 8.

Under the same undisputed facts Developer waived the right to claim Vaughns have no rights in the staff portion of Lot 8.

Waiver is the intentional relinquishment of a known right. Beckstead v. Deseret Roofing Co., Inc., 831 P.2d 130 (Utah App. 1992) and State v. Brooks, 833 P.2d 362 (Utah App. 1992). There must be an existing right, knowledge of its existence and an intent to relinquish it which can be implied from conduct. One cannot prevent a waiver by a private mental reservation contrary to actions clearly indicating relinquishment intent. Beckstead, supra. 831 P.2d 130, 133.

Rowley v. Marrcrest Homeowners, Ass'n., 656 P.2d 414 (Utah 1982) recognizes that a party may "waive" its rights in respect to land use and be therefore "estopped" from endeavoring to thereafter enforce such rights to exclude another's use or rights with respect to that property.

Developer first waived any right Developer had to assert Vaughns had no rights in the staff road right-of-way part of Lot 8 in the Bountiful City Planning Commission meeting held March 1, 1994. (R. 169-170) Those minutes state one of the plat approval conditions imposed by Bountiful City was "dedication of the right-of-way". (R. 169) Developer Hoggan, in the presence of his associate John Clark, then stated before the 11 city officials present and Robert L. Vaughn, that "whether it was dedicated or not, they would like to work with Mr. Vaughn and would put in the improvements and make sure the road is dedicated the way it should be whether for Mr. Vaughns' lot, or the development". (R. 170)

Eight days after that meeting the contract was signed with its recitals set forth above. (R. 225-226)

Developer clearly and intentionally waived, relinquished and abandoned Developer's right to claim Vaughns to be without rights as to the staff portion of Lot 8.

Since the essential facts are shown by undisputed documentary evidence, this court is requested to rule on the legal estoppel/waiver effect of Developers undisputed acts and conduct to avoid a second appeal. See Hermes Associates, supra.

POINT III

DEVELOPER'S ACTION IN TAKING POSSESSION OF AND CUTTING A ROAD THROUGH THE STAFF PORTION OF LOT 8 CONSTITUTED OBTAINING THE BENEFIT OF THE CONTRACT AND PRECLUDED DEVELOPER FROM RESCINDING THE CONTRACT.

A. Contract rescission whether "at law" or "in equity" requires the restoration of the parties to their pre-contract position.

Rescission "at law" includes the requirement of restoration or tender of what was received in the bargain "as a condition of getting restitution". "If the defendant does not go along, the plaintiff will then have to bring a suit to recover restitution for what the plaintiff gave to the defendant in the deal. ... If the plaintiff was right in thinking he had grounds to rescind, the court will render an ordinary judgment for the plaintiff on the theory that because the deal is rescinded, the defendant owes the plaintiff restitution by way of replevin or what used to be called assumpsit." DOBBS, Law of Remedies, 2nd Edition, Vol. 1, §4.8.

Rescission does not permit a party to reap benefits the party would not have reaped if the transaction had not taken place. Rescission requires restoration of the parties to their pre-contract position. Rescission does not require a party to sacrifice the benefits of the agreement and at the same time not be restored to the benefits conferred on the other party. Rowley v. Marrcrest Homeowners, Ass'n., 656 P.2d 414 (Utah 1982); Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah App. 1990); Horton v. Horton, 695 P.2d 102 (Utah 1984); Bergstrom v. Estate of DeVoe, 854 P.2d 860 (Nev. 1993); Cady v. Burton, 851 P.2d 1047

(Mont. 1993); and Vacova Co. v. Farrell, 814 P.2d 255 (Wash. App. 1991).

In discussing "tender", DOBBS states such is normally required "simply because it would be unfair to insist that the defendant give up what he got without any assurance of getting back what he gave." DOBBS, p. 673, 674.

A suit to have a court decree a rescission is called rescission "in equity" DOBBS, Law of Remedies, 2d Ed.Vol.I §4.8 p.675.

DOBBS points out that rescission "in equity" is not accomplished until the court so decrees.

DOBBS states that the cases are divided as to whether the party seeking rescission should tender or offer restoration in his complaint, or show ability to make restoration, but that it is clear that the court is to protect the other party by its decree and must condition rescission upon full restoration.

Developer purported to accept rescission or to effect rescission while ignoring entirely the fact rescission required Developer to relinquish what Developer got under the contract. Developer took possession and used what Developer was to receive under the contract. Developer has not tendered it back, in effect claiming the right to all benefits under the contract while rejecting Developer's contract responsibilities.

Developers taking the benefit of the contract absolutely precludes Developer, as a matter of law, from asserting a right to rescind and reject the contract.

Only if Developer had determined not to use the staff portion of Lot 8 as a means of access to Developer's subdivision would it have been within Developer's right to accept Vaughns' effort to rescind because the parties then would have been returned to their pre-contract position. Vaughns would have been able to use the staff portion of Lot 8 for a private driveway and

would have been relieved of their obligation to make the staff portion of Lot 8 a dedicated publicly traveled street.

It was a breach of Developer's contract duty of good faith for Developer to take the staff portion of Lot 8 while in the act of cashing Vaughns' check which returned the $5,000.00 Developer agreed to pay for the right to turn the staff portion of Lot 8 into a public road.

Developer's action in taking possession of and cutting a road through the staff portion of Lot 8 and failure to place Vaughns in Vaughns pre-contract position, precluded Developer from purporting to accept or effect contract rescission as a matter of law. The trial courts ruling and order failed to address this issue. See ruling and order annexed as Addendums I and II which are contained in the record at 346-350 and 425-427.

B. Developer's failure to act promptly precluded Developer from rescinding.

Even if Developer did have an initial right to rescind (and Developer had no such right) Developer's failure to act promptly precluded Developer from rescinding. Perry v. Woodall, 20 Utah 2d 399, 438 P.2d 813 (1968)

Perry v. Woodall held that the buyer of a business was not entitled to rescind since the buyer had retained possession of the business assets and carried on the business, while expressing dissatisfaction with his purchase and offering to renegotiate. The court held the buyer, after learning all the facts, if he then considered he had been defrauded, had a duty to so notify the seller and promptly tender back the purchased property. "The law is well settled that one electing to rescind a contract must tender back to the other contracting party whatever property of value he has received". Perry v. Woodall, 438 P.2d 813, 815. Perry cited with approval Shappirio v. Goldberg, 24 S.Ct. 259, 192 U.S. 232, which held "that where a party desires to rescind

upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone and he is held bound by the contract."

No misrepresentation nor fraud is or could be claimed in this case. Even when fraud is claimed, the law does not offer indemnity against the adverse consequences of folly and indolence or protect careless indifference to information which would enlighten a contracting party concerning the accuracy or lack thereof of a seller's assertions. Every person reposes at his own peril in another's opinion if he has ample opportunity to exercise informed judgment. Dolson Co. v. Imperial Cattle Co., 624 P.2d 993 (Mont. 1981).

A party cannot retain the fruits of a contract, as Developer did in this case, while awaiting future developments to determine whether it will be more profitable to affirm or to disaffirm. Porras v. Bass, 665 P.2d 1249 (Or.App. 1983) and Ristau v. Wescold, Inc., 852 P.2d 271 (Or.App. 1993).

If Developer wanted to assert that Vaughns had no rights in the staff portion of Lot 8, rather than contracting with Vaughns, Developer should have announced that purpose and adhered to it in January or February 1994 by then undertaking proceedings to obtain a court determination of the matter.

Instead, Developer contracted to acquire Vaughns rights rather than contest them (R. 225-231) and for six months dealt on the basis of the contract, repeatedly asserting Vaughns had no right to rescind and that Developer would perform. R. 284, 297-300)

Developer's failure to act promptly precluded Developer from repudiating Developer's contract even if the contract had been obtained by misrepresentation, which was not the case.

C. There was no factual or legal basis for Developer's assertion rescission was appropriate based on a "mutual mistake of fact".

Developer mischaracterized as a "mutual mistake of fact" Developer's unilateral legal assertion the staff portion of Lot 8 is not part of the lot but a dedicated public road so Vaughns had nothing to sell. The "mutual mistake of fact" claimed by Developer is a "belief that the Vaughns owned the road right-of-way." (R. 70)

A case Developer cited to the trial court, Robert Langston, LTD. v. McQuarrie, 741 P.2d 554 (Utah App. 1987), plainly states a "mutual mistake" requires that both parties share a misconception of vital fact upon which they base their bargain.

Here there was no factual misconception at all. At most there was a difference of opinion as to what legal estates or rights or duties on the part of Vaughns and on the part of Bountiful City were possibly involved in the staff part of flag Lot 8 which, to be a legal lot, as set forth below, had to include the staff to abut and it does abut Bountiful Boulevard, a dedicated street. The staff has the notation "Road Right-of-Way" on it. No street improvements had ever been constructed thereon. (R. 208-210, 213) Bountiful City never assumed and would not assume any obligation to install street improvements, but required either that a private drive be installed, which Bountiful City could use, or that the staff road right-of-way area be dedicated by Vaughns as a public street with Vaughns' development plan altered accordingly with full street improvements installed on the staff/right-of-way area. (See R. 208-210, 220) No "mutual mistake of fact" existed.

Developer deliberately chose not to contest or litigate Vaughns' rights and the nature thereof or the City's rights or duties or the nature thereof, but chose instead to contract with

Vaughns under which Vaughns agreed to give up all legal rights Vaughns held in the staff part of Lot 8 and make it a publicly street for which Developer agreed to put in street improvements, utility stubs and a rock retention wall in a manner making the rest of Lot 8 usable. (R. 225-231)

It is undisputed that Developer has not restored nor tendered restoration of the benefit of its contract. It is undisputed Developer failed to act promptly. It is clear there was no mutual mistake of fact – only Developer's legal opinion that Vaughns own no title to the staff portion of Lot 8.

A trial courts conclusions of law are accorded no deference, but are reviewed for correctness. Doelle v. Bradley, 748 P.2d 1186 (Utah 1989). The legal effect of documents and the party's conduct in respect to their contractual duties are reviewed under a correctness standard. See Hermes Associates, supra. This court is therefore requested to rule as a matter of law Developer had no rescission right to avoid a second appeal.

POINT IV

VAUGHNS WERE ENTITLED TO A RULING ON VAUGHNS' MOTION FOR PARTIAL SUMMARY JUDGMENT PRESENTING THE ISSUE OF WHETHER DEVELOPERS WERE ESTOPPED FROM ATTACKING THE CONTRACT OR CLAIMING RESCISSION AND THE ISSUE OF VAUGHNS' LEGAL TITLE TO THE STAFF PORTION OF LOT 8.

The claims, rights and liabilities of all of the parties to an action are to be adjudicated rather than dismissed without the entry of appropriate rulings. Rule 54, Utah Rules of Civil Procedure and Rule 1(a), Utah Rules of Civil Procedure.

The language of Rule 54(b) and (c)(1) plainly assumes the trial courts have a duty to adjudicate all the claims presented by the parties.

Rule 54(c)(1) provides that every final judgment "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings..." [emphasis added]

Rule 54(b) allows for the entry of a final judgment as to fewer than "all of the claims or parties only upon … (certain conditions) …. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action … before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." [emphasis added]

Vaughns do certainly claim the right to appeal from the final judgment made to this court and do not assert Rule 54 applies in this case to prevent finality of the judgment that was made.

Vaughns point is simply that when one subject matter is presented by cross motions for summary judgment as in this case, it is not appropriate for the trial court to rule on one of the arguments made by one party's motion without considering or ruling upon, or even addressing, the countervailing evidence and arguments made in the other party's motion.

Rule 56, Utah Rules of Civil Procedure clearly precludes the granting of summary judgment when any of the other party's statements and other evidentiary materials present material factual issues. Western Farm Credit Bank v. Pratt, 860 P.2d 376 (Utah App. 1993).

Furthermore, Rule 1(a) Utah Rules of Civil Procedure provides the rules are to be liberally construed to secure the just, expedient and inexpensive determination of every action.

The trial court should not have ruled on Developer's Motion for Summary Judgment when a ruling on the issues presented by Vaughns' Motion for Partial Summary Judgment would affect the correctness of a ruling on Developer's motion.

Rather than ruling on only one argument of one party based on only part of the evidence and dismissing the case, the trial court clearly should have ruled on all related issues and evidence presented by the cross motions for summary judgment in logical order with a view to securing the objective of Rule 1(a), Utah Rules of Civil Procedure.

An issue preliminary to the rescission question was whether Developer was estopped by conduct before the City Council and by entering into the contract from challenging Vaughns' title. If the trial court had found contract estoppel existed, Developer had no basis for claiming rescission on the ground Vaughns lacked title.

If the trial court had ruled no conduct/contract estoppel existed, and the court should not have so ruled without at least granting an evidentiary hearing, then the trial court should have then ruled on the issue of whether "mutual rescission" could occur when Developer vigorously rejected Vaughns rescission effort and the parties agreed the contract would go forward.

If the court determined no contract estoppel existed and that no mutually agreed rescission occurred, the court should then have proceeded to determine whether Vaughns had fee simple, or other title, to the staff portion of Lot 8. If the court so found, Developer would then have had no right to assert rescission on the grounds Vaughns lacked title.

The trial court should also have addressed the issue of whether Developer could rescind while at the same time taking action precluding restoration of Vaughns to Vaughns' pre-contract position.

The objective of Rule 1(a), Utah Rules of Civil Procedure would also have been served had the court deferred ruling on Developer's contract rescission motion to address all contract issues simultaneously. Had the court done so, rather than not

ruling on a number of issues presented and dismissing Vaughns' complaint, the trial outcome may have been substantially different and an appeal proceeding may have been avoided.

The effect of proceeding to determine all issues in an orderly manner would have been to save all parties considerable expense and burden.

As a minimum, under a fair application of the rules, Vaughns were entitled to a ruling on Vaughns' Motion for Partial Summary Judgment which presented the issues of estoppel, waiver, failure to act promptly and other issues arising out of Developer's conduct and also the issue of whether Vaughns owned fee simple title to the staff portion of Lot 8 subject only to a right-of-way for unimproved access to the mountains in favor of Bountiful City.

POINT V

BOUNTIFUL CITY'S SUBSEQUENTLY FILED QUIET TITLE ACTION SHOULD HAVE BEEN CONSOLIDATED WITH THIS CASE.

Developer made Bountiful City a third-party defendant to this case, asserting Bountiful City "owned" the right-of-way. (R. 37-38)

Bountiful City filed an answer admitting that assertion. (R. 343-345)

Rule 19, Utah Rules of Civil Procedure provides for the joinder of parties needed for just adjudication of a subject matter.

Developer, Bountiful City or Vaughns could have joined anyone else whose presence was considered necessary for a proper determination of the issue of ownership rights in the staff/right-of-way area of Lot 8.

Several months after this case was filed third-party defendant Bountiful City filed a separate quiet title action. (See R. 369-375)

Rule 42(a) Utah Rules of Civil Procedure provides:

> (a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid an unnecessary costs or delay.

This case presented just the kind of case contemplated by Rule 42(a). The same subject matter was presented by this case and also by the City's separate quiet title action – the legal rights in the staff/right-of-way portion of Lot 8.

Vaughns filed a motion to consolidated the two cases. (R. 369-375)

The granting of the motion, which the court denied, would have saved all parties the time, trouble and expense of proceeding with two actions at the same time – one on appeal and the other proceeding at the trial level.

Rule 42(b) Utah Rules of Civil Procedure provides:

> (b) **Separate Trials.** The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues.

Under this rule the court could have ordered a separate proceeding as to the title issues after dealing with the contract issues.

Under the circumstances of this case the trial courts denial of Vaughns' Motion for Consolidation was an abuse of discretion. See Page v. Utah Home Fire Inc. Co., 391 P.2d 290 (Utah 1964).

CONCLUSION

1. Because the undisputed facts show Developers rejected Vaughns rescission effort, insisted on contract performance and

Vaughns consented thereto and requested return of Vaughns' check mutually agreed rescission did not occur as a matter of law. Rejecting Vaughns rescission effort and promising and electing contract performance, action upon Vaughns relied, estopped Developer from later purporting to accept rescission. By that conduct, Developer waived Developer's right to accept contract rescission. This court should rule on the matter as a matter of law since the legal effect of documents and the conduct of contracting parties is subject to review under a correctness standard.

2. Developer's actions before the Bountiful City Council and action in entering into the contract with Vaughns under which Developer specifically acknowledged Vaughns legal title to the staff portion of Lot 8, and Vaughns reliance thereon, estopped Developer from later denying Vaughns legal title as a purported basis for rescission and constituted waiver of such right. Since the facts are undisputed, this court should rule on the effect of such actions as a matter of law.

3. Developer's failure to act promptly to rescind and late action in taking possession of and cutting a road through the staff portion of Lot 8 constituted affirming, obtaining and keeping the benefit of the contract – action preventing restoration of Vaughns to their pre-contract position and precluded Developer from rescission. Since the facts with respect thereto are undisputed, this court should rule on the effect of such action as a matter of law.

4. Developer's legal opinion of Vaughns legal rights does not constitute a "mutual mistake of fact" justifying rescission and this court should so rule as a matter of law.

5. This court should hold that Vaughns were entitled to a ruling on the estoppel, waiver, election to proceed with the contract issues and on the issue of Vaughns' legal title to the

staff portion of Lot 8 matters presented by Vaughns' Motion for Partial Summary Judgment.

6. This court should hold that Bountiful City's subsequently filed quiet title action should have been consolidated with this case under Rule 42(a) Utah Rules of Civil Procedure.

7. This court should reverse the ruling and order of the lower court, hold contract rescission did not occur as a matter of law and that Developer is estopped from challenging Vaughns legal title to the staff right-of-way portion of Lot 8.

8. The court should reverse the dismissal of the case, rule that the subsequently filed quiet title action should have been consolidated with this proceeding, reverse the denial of Vaughns' Motion to Consolidate and remand the case to the lower court for further proceedings on the remaining contract issues.

RESPECTFULLY SUBMITTED this 1st day of August, 1995.

David S. Cook
Attorney for Appellants Robert L. and G. Jeanie Vaughn

Served the foregoing by delivering two copies thereof to Bryce D. Panzer, Blackburn & Stoll, L.C., Attorneys for Defendants/Respondents, Kent A. Hoggan and Maple Oaks, L.C., 77 West 200 South, Suite 400, Salt Lake City, Utah 84101 and to Russell L. Mahan, Attorney for Third-Party Defendant Bountiful City, 790 South 100 East, Bountiful, Utah 84010 this 1st day of August, 1995.

ADDENDUM I

RULING ON DEFENDANTS MOTION FOR SUMMARY JUDGMENT DATED JANUARY 6, 1995.

FILED
March 9, 1995
2d District

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

ROBERT L. VAUGHN and G. JEANIE VAUGHN, Plaintiffs, v. KENT A. HOGGAN and MAPLE OAKS, L.C., Defendants.	**RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Case No. 940700296

The Court heard oral argument in this matter on December 13, 1994 at 2:30 p.m. and has reviewed the memoranda filed by the parties on Defendants' Motion for Summary Judgment. In addition, the Court has also reviewed the other documents on file with the Court. Having done so, and now being fully advised, the Court enters the following findings and ruling:

1. The Court finds that on or about November 8, 1990, Robert L. Vaughn and G. Jeanie Vaughn (hereinafter Plaintiffs), acquired Lot 8, Indian Springs Subdivision Plat "A", by Special Warranty Deed from Zions First National Bank.

2. That on or about March 9, 1994, Plaintiffs entered into an agreement with Kent A. Hoggan and Maple Oaks, L.C. (hereinafter Defendants). The primary objective of said agreement was to provide additional access to Maple Oaks' development across property believed to be owned by Plaintiffs (hereinafter flag staff portion of Lot 8).

3. That pursuant to the said agreement, Defendants agreed *inter alia* to pay Plaintiffs $5,000.00 on or before April 10, 1994, in consideration for Plaintiffs agreeing to sign Defendants' Highland Estates Subdivision Plat, which plat proposed to be recorded so

that the flag staff portion of Lot 8 would be dedicated to the Bountiful City as a public street.

In addition, Defendants also agreed *inter alia* to exercise reasonable good faith efforts to cause or to encourage Bountiful City to issue Plaintiffs a building permit, wherein Bountiful City would approve the proposed alterations in the elevation of the proposed street so that the Plaintiffs proposed driveway exit onto said proposed street would comply with Bountiful City's maximum slope requirement without requiring the elevation of Plaintiffs' driveway to be altered.

4. That Bountiful City required a $75,000.00 bond for road and related off-site improvements before it would issue Plaintiffs a building permit.

5. That Defendants did not post the foregoing off-site improvement completion bond with Bountiful City as it was required to do pursuant to its agreement with Plaintiffs.

6. That as a direct result of Defendants' failure to post said bond by August 15, 1994, Plaintiffs, on or about August 16, 1994, sent a letter to Defendants which stated in relevant part as follows: "[t]herefore, at the request of Robert L. and G. Jean Vaughn, herewith is the Vaughn's check no. 5026 in the sum of $5,000.00, constituting return of the sum you [Plaintiffs] paid Vaughns pursuant to the referenced Agreement. Said Agreement is hereby declared rescinded for breach on your part." See Letter from David S. Cook to Kent A. Hoggan and Maple Oaks, L.L.C., dated August 16, 1994.

7. That on or about September 8, 1994, Plaintiffs subsequently acknowledged their aforementioned rescission by stating the following: "[t]he unexplained delay at that point suggested your client could well fail to post the bond by August 15, so it appeared Vaughns building alternative would be to rescind the agreement for nonperformance on your clients part . . . ." See Letter from David S. Cook to Bryce D. Panzer, dated September 8, 1994,

attached as Exhibit H to the Affidavit of David S. Cook.

8. That Plaintiffs and Defendants did not thereafter reach any subsequent agreement and did not do anything that revived the March 9, 1994 agreement.

9. That despite continued settlement negotiations, Plaintiffs at no time withdrew or attempted to withdraw their August 16, 1994 rescission. Moreover, Defendants never attempted to revive the March 9, 1994 agreement by returning the $5,000.00 to Plaintiffs that Defendants were originally obligated to pay Plaintiffs under the terms of the agreement.

10. That on August 16, 1994, at the time of said rescission, both Plaintiffs and Defendants were restored to their respective pre-contract positions. Indeed, notwithstanding Defendants' later decision to cut a road on the flag portion of Lot 8, Defendants' action ensued after their previous agreement with Plaintiffs had been rescinded by Plaintiffs. Thus, the Court finds that Defendants' action in cutting a road on the flag portion of Lot 8 was not premised upon the March 9, 1994 agreement. Rather, the Court finds that Defendants' action in cutting a road on the flag portion of Lot 8 was based on Defendants' belief, mistaken or otherwise, that Plaintiffs in fact did not own any interest in said flag portion after all.

CONCLUSION

Therefore, the Court finds that the foregoing undisputed facts 1-10 establish that a valid rescission of the March 9, 1994 agreement between Plaintiffs and Defendants occurred on August 16, 1994. See Acton v. Deliran, 737 P.2d 996, 999 n.5 (Utah 1987) ("rescission at law . . . is completed when, having grounds justifying rescission, one party to a contract notifies the other party that he intends to rescind the contract and returns that which he received under the contract").

Thus, based on the foregoing analysis, the Court finds that Defendants' Motion for

Summary Judgment should be granted. However, the Court notes that this ruling is limited only to Plaintiff's contract claims brought in the instant case and in no way precludes Plaintiff from filing other non-contract claims at a later time.

Dated January 6, 1995.

BY THE COURT:

Jon M. Memmott

DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the foregoing Ruling on the 6th of January, postage prepaid, to the following:

David S. Cook
85 West 400 North
Bountiful, Utah 84010

Bryce D. Panzer
BLACKBURN & STOLL, LC
77 West 200 South, Suite 400
Salt Lake City, Utah 84101

Michael D. Di Reda
Law Clerk to the Honorable Jon M. Memmott

ADDENDUM II

ORDER: (1) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; (2) DENYING PLAINTIFFS' MOTION TO CONSOLIDATE; (3) DENYING DEFENDANTS' MOTION FOR ATTORNEY'S FEES; (4) GRANTING DEFENDANTS' MOTION FOR VOLUNTARY DISMISSAL OF COUNTERCLAIMS AND THIRD-PARTY COMPLAINTS; AND (5) DISMISSING PLAINTIFFS' CLAIMS AGAINST JOHN DOES 1-5 DATED MARCH 29, 1995.

BRYCE D. PANZER (A2509)
BLACKBURN & STOLL, LC
Attorneys for Defendants
77 West 200 South, Suite 400
Salt Lake City, Utah 84101
Telephone: (801) 521-7900

FILED
MAR 30 95
2d DIST. CT.

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

ROBERT L. VAUGHN and G. JEANIE VAUGHN,

Plaintiffs,

vs.

KENT A. HOGGAN, MAPLE OAKS, L.C., and JOHN DOES 1-5,

Defendants.

MAPLE OAKS, L.C.,

Third-party Plaintiff,

vs.

BOUNTIFUL CITY, a municipal corporation,

Third-Party Defendant.

ORDER: (1) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; (2) DENYING PLAINTIFF'S MOTION TO CONSOLIDATE; (3) DENYING DEFENDANTS' MOTION FOR ATTORNEY'S FEES; (4) GRANTING DEFENDANTS' MOTION FOR VOLUNTARY DISMISSAL OF COUNTERCLAIMS AND THIRD-PARTY COMPLAINT; and (5) DISMISSING PLAINTIFFS' CLAIMS AGAINST JOHN DOES 1-5

Civil No. 940700296

Judge Jon M. Memmott

Pending motions and objections in this matter came on regularly for hearing on March 7, 1995, before the above-entitled Court, the Honorable Jon M. Memmott, District Court Judge, presiding. David S. Cook appeared on behalf of plaintiffs, Bryce D. Panzer of Blackburn & Stoll, LC, appeared on behalf of the defendants Kent A. Hoggan and Maple Oaks, L.C., and Russell L. Mahan appeared on behalf of the third-party defendant, Bountiful City. Having considered the motions, memoranda, and arguments of counsel, the Court having heretofore issued its Ruling on Defendants' Motion for Summary Judgment, dated January 6, 1995, and the Court having stated its further rulings and reasons therefore on the record in open court, it is hereby

ORDERED as follows:

1. Plaintiffs' objections to the form of the order submitted by Defendants with respect to Defendants' Motion for Summary Judgment are hereby overruled. In view of the further rulings by the Court, however, the Court's formal order on Defendants' Motion for Summary Judgment is set forth in this order.

2. Defendants' Motion for Summary Judgment is granted as to Plaintiffs' contract claims and Plaintiffs' Amended Complaint is hereby dismissed, with prejudice, as to Defendants Kent A. Hoggan and Maple Oaks, L.C. This Order shall not, however, preclude Plaintiffs from filing other non-contract claims against Defendants at a later time in a separate action.

3. Plaintiffs' Motion for Consolidation of this action with City of Bountiful v. Vaughns, et al., Civil No. 94-0700375-QT, is hereby denied.

4. Defendants' Motion for Award of Attorney's Fees is hereby denied.

5. Defendants' Motion for Voluntary Dismissal of Counterclaims and Third-Party Complaint is hereby granted, and said claims are hereby dismissed, without prejudice.

6. Plaintiffs' remaining claims against John Does 1-5 are hereby dismissed, without prejudice.

7. The Court intends this order to be a final judgment, which disposes of all of the claims between all of the parties.

8. The parties shall bear their own costs incurred herein.

DATED this 29th day of March, 1995.

BY THE COURT:

Jon M. Memmott
District Court Judge

Approved as to form:

BLACKBURN & STOLL, LC

Bryce D. Panzer
Attorneys for Defendants

David S. Cook
Attorneys for Plaintiffs

Russell L. Mahan
Attorneys for Third-Party Defendant